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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 514

BYRON THORNHILL,

Petitioner

v.

STATE OF ALABAMA,

Respondent

SUPPLEMENTAL BRIEF FOR RESPONDENT.

THOS. S. LAWSON,
Attorney General of Alabama,

WILLIAM H. LOEB,
Assistant Attorney General of Alabama,

For the State of Alabama.

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INDEX

SUBJECT INDEX

Argument

1. Whether the petitioner was loitering without a just cause or legal excuse therefor was an exculpatory fact, the burden of proof of which was upon him 2

2. If the evidence was insufficient to sustain the conviction of loitering but sufficient to sustain conviction of picketing, the general judgment rendered by the court is properly referable to the count sustained by the evidence 11

3. Validity of judgment entry 14

4. Cases cited by petitioner 15

   A. Handbill cases 15

   B. Senn v. Tile Layers Union 20

Conclusion 21

TABLE OF CASES CITED

Page

Bailey v. State, 161 Ala. 75, 49 So. 886 6

Burt v. State, 159 Ala. 134, 48 So. 851 14

Cleveland v. State, 20 Ala. App. 426, 103 So. 707, cert. den. 212 Ala. 635, 103 So. 711 13

Corrunker v. State, 19 Ala. App. 500, 98 So. 363 13

Davis v. Massachusetts, 167 U. S. 43 19

Folmar v. State, 19 Ala. App. 435, 97 So. 768 .... 8, 9

Hague v. C. I. O., 307 U. S. 496 19

Haney v. State, 19 Ala. App. 79, 95 So. 57 12

Jacobs v. State, 17 Ala. App. 396, 85 So. 837 4

Myrick v. State, 20 Ala. App. 18, 100 So. 455 13

Nichols v. Commonwealth of Massachusetts, No. 29 15

Osborne v. State, 25 Ala. App. 276, 144 So. 599 13

Owens v. State, 74 Ala. 401 5

Redwine v. State, 28 Ala. App. 95, 179 So. 390 13

TABLE OF CASES CITED—Continued

Page

Reid v. State, 18 Ala. App. 371, 92 So. 513 4

Schneider v. State, No. 11 15

Senn v. Tile Layers Union, 301 U. S. 468 20

Snyder v. City of Milwaukee, No. 18 15

Watson v. State, 20 Ala. App. 372, 374, 102 So. 492, cert. den. 212 Ala. 330, 102 So. 494 12

Weeks v. State, 24 Ala. App. 198, 132 So. 870; cert. den. 222 Ala. 442, 132 So. 871 4

Williams v. State, 27 Ala. App. 227, 169 So. 337 13

Worrell v. State, 24 Ala. App. 313, 136 So. 737, cert. den. 223 Ala. 425, 136 So. 738 4

Young v. People of California, No. 13 15

TABLE OF STATUTES CITED

Constitution of 1901,
Section 35 21

Code of Alabama, 1896
Section 4730 6

Code of Alabama, 1907
Section 7423 8

Code of Alabama, 1923
Section 3448 2

IN THE

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OCTOBER TERM, 1939.

No. 514

BYRON THORNHILL,

Petitioner

v.

STATE OF ALABAMA,

Respondent

SUPPLEMENTAL BRIEF FOR RESPONDENT.

This brief is respectfully submitted to this Court by and with the consent of the Court first had and obtained on, to wit, March 2, 1940.

The purpose of this brief is to supply the Court with authoritative answers to certain propositions raised by the Court from the bench during the course of the oral argument of this cause, for the State feels that in all fairness to the Court citations of authority should be made available to the Court with respect to these propositions which were not covered in the original brief.

I.

WHETHER THE PETITIONER WAS LOITERING *WITHOUT A JUST CAUSE OR LEGAL EXCUSE THEREFOR* WAS AN EXCULPATORY FACT, THE BURDEN OF PROOF OF WHICH WAS UPON HIM.

It is to be remembered that the petitioner in this case was charged with having offended Section 3448 of the Code of Alabama, 1923. That Section provides as follows:

> "Section 3448. Loitering or picketing forbidden.—Any person or persons who, without a just cause or legal excuse therefor, go near to or loiter about the premises or place of business of any other person, firm, corporation, or association of people, engaged in a lawful business, for the purpose, or with intent of influencing, or inducing other persons not to trade with, buy from, sell to, have business dealings with, or be employed by such persons, firm, corporation, or association, or who picket the works or place of business of such other persons, firms, corporations, or associations of persons, for the purpose of hindering, delaying, or interfering with or injuring any lawful business or enterprise of another, shall be guilty of a misdemeanor; but nothing herein shall prevent any person from soliciting trade or business for a competitive business."

It will be noted that Section 3448 charges two offenses, first, going near to or loitering about the premises or place of business of another for the purpose or with the intent of infuencing, etc. other persons not to have business dealings with or be employed by such person and, second, picketing the works or place of business of such other person for the purpose of hindering, delaying or interfering with or injuring the lawful business or enterprise of such other person. During the course of the oral argument, the question was raised with respect to whether or not the State had presented sufficient evidence to prove the first offense, to wit, that the Petitioner did go near to or loiter about the premises of another, etc.

The record, shows without dispute that petitioner, Byron Thornhill, was on the premises of the Brown Wood Preserving Company (R. 9, 10). We thus have a clear showing that petitioner did go near to or loiter about the premises or place of business of another person, firm or corporation.

The record next reveals that Thornhill approached one Clarence Simpson, a former employee of the Brown Wood Preserving Company, who was attempting to return to work in response to a notice posted by the company requesting their employees to return, and stated to him that "they were on a strike and did not want anybody to go up there to work" (R. 10). It appears that thereupon Clarence Simpson went away and did not attempt to return to work. It thus appears that a person was influ-

enced or induced by Petitioner not to be employed by the Brown Wood Preserving Company, for the law presumes that every person intends to do what he does and that the natural and probable consequences of his acts were intended.

Jacobs v. State, 17 Ala. App. 396, 85 So. 837;

Reid v. State, 18 Ala. App. 371, 92 So. 513;

Weeks v. State, 24 Ala. App. 198, 132 So. 870;

certiorari denied 222 Ala. 442, 132 So. 871;

Worrell v. State, 24 Ala. App. 313, 136 So. 737, cert. den. 223 Ala. 425, 136 So. 738.

It is submitted therefore that the State has met the burden of showing that Thornhill was loitering for the purpose of with the intent of influencing or inducing other persons not to be employed by the Brown Wood Preserving Company.

It is true that no evidence was presented by the State tending to show that Byron Thornhill was loitering or that he did go near to the premises of the Brown Wood Preserving Company "without a just cause or legal excuse therefor." It is submitted, however, that whether Thornhill was loitering with or without a just cause or legal excuse was an exculpatory fact, the burden of proof of which was upon the defendant rather than the State.

In a very early case (*Owens v. State*, 74 Ala. 401) the Supreme Court of Alabama, in a prosecution for trespass after warning under Section 4419 of the Code of Alabama of 1876, which provided that:

> "Any person who, *without legal cause or good excuse*, enters into the dwelling house or on the premises of another, after having been warned, within six months preceding, not to do so, is guilty of a misdemeanor, and, on conviction, must be fined not more than $100; and may also be imprisoned in the county jail or sentenced to hard labor for the county for not more than three months." (Emphasis supplied)

considered the question of whether the burden was upon the State to prove that the trespass had been done "without legal cause or good excuse." The court concluded that the following charge requested by the defendant was rightly refused:

> "The State must show by the whole evidence, beyond a reasonable doubt, first, that the defendant had been warned, within six months next preceding the time that the State elected to proceed against the defendant, not to trespass upon McCall's land; second, that the defendant knowingly entered upon said McCall's land, and, third, *that he entered upon said McCall's land without a legal cause or good excuse.*" (Emphasis supplied)

Mr. Justice Stone, speaking for the Supreme Court of Alabama, concluded:

> "The third charge asked by defendant was rightly refused. If the act of warning, and trespass within six months afterwards was sufficiently proved, it was not necessary the State should go further and prove the act was done without legal cause or lawful excuse. This was defensive matter, the proof of which rested with the defendant, unless the testimony which proved the act proved also the excuse — Hadley v. State, 55 Ala. 31."

In a later case, *Bailey v. State*, 161 Ala. 75, 49 So. 886, the defendant was charged with having violated Section 4730 of the Code of Alabama of 1896, as amended by General Acts of 1907, page 636, providing as follows:

> "Section 4730. Any person, who with intent to injure or defraud his employer, enters into a contract in writing for the performance of any act of service, and thereby obtains money or other personal property from such employer, and with like intent, and *without just cause*, and without refunding such money, or paying for such property, refuses or fails to perform such act or service, must on conviction be punished by a fine in double the damage suffered by the injured party, but not more than $300, one-half of said fine to go to the county and one-half to the party injured; and any person, who with

intent to injure or defraud his landlord, enters into any contract in writing for the rent of land, and thereby obtains any money or other personal property from such landlord, and with like intent, *without just cause*, and without refunding such money, or paying for such property, refuses or fails to cultivate such land, or to comply with his contract relative thereto, must on conviction be punished by fine in double the damage suffered by the injured party, but not more than $300, one-half of said fine to go to the county and one-half to the party injured. And the refusal or failure of any person, who enters into such contract, to perform such act or service or to cultivate such land, or refund such money, or pay for such property *without just cause* shall be prima facie evidence of the intent to injure his employer or landlord or to defraud him." (Emphasis supplied)

It was contended that the Legislature should have defined "just excuse" for the reason that there was no criterion laid down by the statute by which one could regulate his actions so as to know that he was abiding by the law and it was argued that, in the absence of such a definition, the statute denied to the defendant due process of law.

The court, in treating this contention, concluded:

"It seems to us that, if the Legislature had attempted this, (a definition of "just excuse")

> the result would have been more restrictive upon the defendant than was the leaving of the determination of this question to court and jury; *for, 'just cause' is defensive matter brought forward by the accused,* necessarily depending, for sufficiency, upon the peculiar facts of each case and the wider the latitude in respect thereto the more advantageous the situation of the accused." (Emphasis supplied)

Numerous other cases have been decided by the appellate courts of Alabama, on similar propositions, a number of which are collated in the opinion of the Court of Appeals in *Folmar v. State*, 19 Ala. App. 435, 97 So. 768.

In the Folmar case the defendant was convicted of having violated Section 7423 of the Code of Alabama, 1907, which provided as follows:

> "Any person who sells or conveys any personal property upon which he has given a written mortgage, lien or deed of trust, and which is then unsatisfied in whole or in part, without first obtaining the consent of the lawful holder thereof to such sale or conveyance must, on conviction, be fined not more than $500 and may also be imprisoned in the county jail or sentenced to hard labor for not more than six months, one or both, in the discretion of the jury."

The defendant excepted to the following portion of the oral charge of the court:

"Now, then, the next question is that this must have been without obtaining the consent of the lawful holder thereof. And is there any evidence to show that W. B. Folmar & Sons consented to the sale of this cotton. My understanding of the rule of law is that the question of consent would be upon the defendant; if he had the consent of W. B. Folmar & Sons, it would be his duty to show that he had the consent, and it is not necessary for the state, to make out its case, to show by each member of the firm of W. B. Folmar & Sons' separately that they did not give their consent. I think, if the defendant had the consent of them, it would be be incumbent upon him, as a defense in the case, to show that consent."

The Court of Appeals, in treating the charge, states:

"The oral charge of the court correctly states the law. The burden was not upon the state to show that the holder of the mortgage did not consent to a sale of the mortgaged property. The state, having proven the mortgage, the existence of the debt, and the sale of the mortgaged property by the defendant, discharged the burden resting upon it, and the burden was then on the defendant, if he relied upon that defense, to introduce evidence to show that the mortgagee consented to a sale of the mortgaged property. In the case of Freiberg v. State, 94 Ala. 91, 10 South. 703, the defendant

was convicted for selling or giving liquor to a minor without the consent of the parent, or the person having the management or control of the minor. The court held that the burden was on the defendant to prove the consent, and not the prosecution to prove the want of it. In a prosecution for unlawfully riding on a train without the consent of the train operators, it was held that the burden of proving the negative averments that the defendant was not in the employ of the railroad company, and that he was riding without authority from the engineer or conductor, was not upon the state; such facts being peculiarly in the knowledge of the defendant. Gains v. State, 149 Ala. 29, 43 South. 137.

"In prosecutions for engaging in certain occupations without a license, where a license is required, it has been held that it does not devolve on the state to show that the defendant had no license, but on the defendant to show affirmatively that he had. Bibb v. State, 83 Ala. 84, 3 South. 711; Porter v. State, 58 Ala. 66. The general rule is that:

> " 'Where the subject-matter of a negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true, unless disproved by that party.' Farrall v. State, 32 Ala. 557; Greenleaf on Ev. (16th Ed.) p. 154, Section 79."

It is submitted, therefore, in view of the above quoted authorities, that the Court of Appeals of Alabama was not in error in concluding that the evidence presented by the State justified the conviction of loitering under the statute, it being particularly noted that not only did petitioner not present evidence of just cause or legal excuse but on the contrary when, after having filed his motion to exclude the evidence because of the insufficiency thereof, he was queried by the Court with respect to whether he insisted upon this ground of the motion, replied, through counsel, that he did not do so in as much as it was necessary for him to be convicted in order to test the constitutionality of the statute (R. 13, 14).

II.

IF THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN THE CONVICTION OF LOITERING BUT SUFFICIENT TO SUSTAIN CONVICTION OF PICKETING, THE GENERAL JUDGMENT RENDERED BY THE COURT IS PROPERLY REFERABLE TO THE COUNT SUSTAINED BY THE EVIDENCE.

Assuming for the purpose of argument that the State did not meet the burden of proof with respect to the offense of loitering, it is submitted that there is adequate evidence to support a finding that this petitioner was picketing the works or place of business of the Brown Wood Preserving Company for the purpose of hindering, delaying or interfer-

ing with or injuring the lawful business or enterprise of such company as was charged in the third count of the complaint filed in the Circuit Court of Tuscaloosa County (R. 5). It is to be noted that the judgment entry of the Circuit Court of Tuscaloosa County, sitting without a jury, is general in form, in that, it is recited that the defendant, Byron Thornhill, is "guilty of loitering and picketing as charged in the complaint." (R. 9)

The rule has many times been stated by the appellate courts of Alabama that where there is a general judgment of guilt under an indictment or complaint charging several offenses, if the evidence is sufficient to sustain a convicton under one count of the indictment or complaint but not under another count, the judgment is referable to the count sustained by the evidence. *Watson v. State*, 20 Ala. App. 372, 374, 102 So. 492, cert. den. 212 Ala. 330, 102 So. 494 (where the defendants were jointly indicted for burglary and grand larceny, the indictment containing two counts, and a general verdict of guilty was rendered against the defendants after proof of grand larceny only. It is to be particularly noted that the judgment entry recites, after verdict of guilty as charged in the indictment is shown, that "it is, therefore, ordered and adjudged by the court that the defendant, Frank Watson, is guilty as charged in the indictment, of burglary," etc. and that the Court of Appeals treated the words "of burglary" in the judgment entry as "mere surplusage." The Supreme Court evidently accepted this treat-

ment as correct for, as noted, certiorari was denied without further opinion, 212 Ala. 330).

Corrunker v. State, 19 Ala. App. 500, 98 So. 363 (where defendant was tried upon an affidavit containing two counts, one charging the sale of prohibited liquors and the second, possession of prohibited liquors, and the evidence justifying conviction under one of the counts only, the Court of Appeals sustaining the judgment held that the general verdict of guilty was referrable to that count.)

See also Williams v. State, 27 Ala. App. 227, 169 So. 337;

Osborne v. State, 25 Ala. App. 276, 144 So. 599;

Redwine v. State, 28 Ala. App. 95, 179 So. 390;

Myrick v. State, 20 Ala. App. 18, 100 So. 455;

Cleveland v. State, 20 Ala. App. 426, 103 So. 707, cert. den. 212 Ala. 635, 103 So. 711;

Haney v. State, 19 Ala. App. 79, 95 So. 57

It is submitted therefore, that since the evidence introduced by the State permitted no other conclusion but that petitioner was picketing the works or place of business of the Brown Wood Preserving Company and since it appears, in view of

the rule that the law presumes that every person intends to do what he does (authorities supra) that this petitioner intended to hinder, delay, interfere with or injure the lawful business or enterprise of the Brown Wood Preserving Company, this Court should conclude that the evidence was sufficient to justify a conviction of picketing and that, even assuming for the purpose of argument that the State did not make out its case with respect to loitering, the general judgment entry of the Court is properly referable to count three of the complaint charging picketing and supported by the evidence.

III.

VALIDITY OF JUDGMENT ENTRY.

While what has been said hereinabove is upon the assumption that the judgment entry is in all respects valid, we feel that in as much as the questions put by members of the Court during the course of the oral argument directed attention to the judgment entry, and since it does not appear that either the Court of Appeals or the Supreme Court considered in their opinions the sufficiency of the judgment entry, we should call the Court's attention to the case of *Burt v. State*, 159 Ala. 134, 48 So. 851, which deals with a judgment entry in which the defendant was convicted of two different offenses based upon one single act or one course of conduct, one transaction. In that case, the Supreme Court of Alabama held that there can be but one conviction of the offender for a single act, though that act

should be in violation of one or more penal statutes. While the Burt case may not here be of determining importance, in view of the questions put by members of this Court we feel it to be our duty to bring to the Court's attention this ruling of the Alabama court for the reason that the judgment entry in the instant case seems to convict the defendant of two offenses based upon a single act, in that, the defendant has been found guilty of loitering and picketing and a sentence has been imposed upon him requiring that he pay a fine of $100 and costs (R. 8).

IV.

CASES CITED BY PETITIONER.

Handbill Cases.

During the course of argument, counsel for petitioner strongly contended that the so-called "handbill cases" (*Schneider v. State*, No. 11; *Young v. People of California*, No. 13; *Snyder v. City of Milwaukee*, No. 18 and *Nichols v. Commonwealth of Massachusetts*, No. 29) are persuasive authority with respect to the position taken by petitioner that a sovereign state is without authority to regulate or prohibit picketing or loitering.

In each of the handbill cases, this court reversed the holding of the state court on the ground that the ordinance in question amounted to or could be applied as a prohibition of the distribution of handbills on the streets.

The Los Angeles code provision in question provided, Sec. 28.01:

> "No person shall distribute any handbill to or among pedestrians along or upon any street, sidewalk or park, or to passengers on any streetcar, or throw, place or attach any handbill into or upon any automobile or other vehicle."

Appellant was convicted of violating this ordinance by distributing handbills, of which he still had more than 300 in his possession, to pedestrians on a public sidewalk.

The ordinance in question in the city of Milwaukee provided:

> "It is hereby made unlawful for any person * * * to circulate or distribute any circulars, handbills, cards, posters, dodgers, or other printed or advertising matter * * * in or upon any sidewalk, street, alley, wharf, boat landing, dock or other public place, park or ground within the city of Milwaukee * * *."

The petitioner in this case along with sixteen others, was convicted of violating this ordinance by acting as a picket in front of a meat market where a strike was in progress and of passing out handbills to pedestrians concerning the same. Many of the bills were in fact thrown on the street by the persons receiving them.

The Worcester, Massachusetts ordinance provided:

> "No person shall distribute in, or place upon any street or way, any placard, handbill, flyer, poster, advertisement or paper of any description."

The pamphlets distributed on the street in this case announced a meeting in connection with the administration of state unemployment insurance.

The ordinances in the Los Angeles, Milwaukee and Worcester cases this Court held to be general prohibitions and consequently void. It had no difficulty in arriving at that conclusion. The court discussed certain restrictions that might be imposed on the freedom of the press. It reiterated the right referred to in the Griffin case to suppress obscene and immoral literature. It further pointed out that a municipality may enact regulations in the interest of public safety, health, welfare or convenience, but in doing so it may not abridge the constitutional right of free speech and freedom of the press. It stated a person "could not exercise this liberty by taking his stand in the middle of a crowded street, contrary to traffic regulations, and maintain his position to the stoppage of all traffic; a group of distributors could not insist upon a constitutional right to form a cordon across the street and to allow no pedestrian to pass who did not accept a tendered leaflet; nor does the guarantee of freedom of speech or of the press deprive a munici-

pality of the power to enact regulations against throwing literature broadcast in the streets. Prohibition of such conduct does not abridge the constitutional liberty since such activity bears no necessary relationship to the freedom to speak, to print or distribute information or opinion."

The Town of Irvington, New Jersey, ordinance was somewhat broader in its scope than that involved in the other three cases. It provided:

> "No person except as in this ordinance provided shall canvass, solicit, distribute circulars, or other matters, or call from house to house in the Town of Irvington without having first reported to and received a written permit from the Chief of Police or the officer in charge of police headquarters."

The applicant for a permit was required to supply information concerning himself and the permit was then granted in the discretion of the police officer to proper persons. The petitioner in this case was distributing circulars of a religious sect and accepting contributions to make it possible that additional booklets could be placed in the hands of others. The activity carried on in this case differed from that in the other cases only by the distribution being on private premises while in the other cases the distribution complained of was on a public street and resulted in littering the same. The court points out here that if there is not an absolute prohibition of the distribution of published material it

at least results in censorship and prelicensing by the police.

In our judgment, the pivotal point of these cases is that the littering of the street itself was not thought by the court to be sufficient ground for such drastic measures prohibiting or interfering with the distribution of handbills. The court holds the prevention of the littering of streets, the single public benefit to be obtained to be of minor importance as compared to the matter of preserving the freedom of the press and freedom of speech. Mr. Justice Roberts, speaking for the court says:

> "Any burden imposed upon the city authorities in clearing and caring for the streets as an indirect consequence of such distribution results from the constitutional protection of the freedom of speech and press."

It is submitted, however, that the end involved in this case, the Thornhill case, is the protection of the property of the community from ultimate destruction and that Section 3448 is a direct enactment to this end. Moreover, the statute is not directly aimed at a suppression of the right of freedom of speech or freedom of press but is directed to other activities as well. Indeed, it may be likened to the ordinance of the City of Boston, Massachusetts, considered in *Davis v. Massachusetts*, 167 U. S. 43, of which this Court spoke in *Hague v. C. I. O.*, 307 U. S. 496, stating that the court would recognize the difference between an ordinance directed "solely at

the right of speech and assemblage" and one "addressed as well to other activities", concluding the former to be unlawful and the latter justifiable.

Senn v. Tile Layers Union

301 U. S. 468.

During the course of the argument, petitioner read the following from the case of Senn v. Tile Layers Union:

> "Members of the Union might without special statutory authorization by a state make known the facts of a labor dispute for freedom of speech is guaranteed by the federal constitution."

From this quotation counsel drew the conclusion that the Court had determined that the right to picket was guaranteed by the Fourteenth Amendment.

Counsel failed, however, to read the sentence immediately following the foregoing quotation, in which the Court said:

> "The state may, in the exercise of its police power, regulate the methods and means of publicity as well as the use of public streets."

It is respectfully submitted that Section 3448 merely regulates the methods and means of pub-

licity, in that, it simply provides that a person may not loiter or go near to the premises or place of business of another without just cause and legal excuse for the purposes set forth in the statute and it further provides that a person may not picket the works or place of business of another for the purpose of hindering, delaying, interfering with or injuring the lawful business of such person. It is respectfully submitted that this is a justifiable exercise of the police power of the Legislature of the State of Alabama directed to a justifiable end.

CONCLUSION.

It is, therefore, respectfully submitted that it having been shown that this petitioner was properly convicted of the offenses charged under Section 3448 of the Code of Alabama, 1923, the sole question presented for decision is as to the constitutionality of that section. In this regard, may we again respectfully insist that the Legislature in enacting Section 3448 was seeking to give effect to the pronouncement of the Constitutional Convention of Alabama of 1901, as expressed in Section 35 of the Constitution of Alabama of 1901, that the sole object and only legitimate end of government is to protect the citizen in the enjoyment of life, liberty and property, by restricting the places at which loitering or picketing could be carried on and the purposes for which loitering or picketing could be conducted. It is respectfully insisted that in so regulating loitering and picketing the Legislature of Alabama offended no constitutional provision, for

again we say that neither counsel for petitioner nor the writers of this brief have succeeded in finding a single judicial statement that the right to loiter or the right to picket is guaranteed by either the Fourteenth Amendment of the Constitution of the United States or of any other phase of the Constitution of the United States.

Respectfully submitted,

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pp: 5 • 6

SUPREME COURT OF THE UNITED STATES.

No. 514.—October Term, 1939.

Byron Thornhill, Petitioner,
vs.
The State of Alabama.

On Writ of Certiorari to the Court of Appeals of the State of Alabama.

[April 22, 1940.]

Mr. Justice Murphy delivered the opinion of the Court.

Petitioner, Byron Thornhill, was convicted in the Circuit Court of Tuscaloosa County, Alabama, of the violation of Section 3448 of the State Code of 1923.[1] The Code Section reads as follows:

"Section 3448. Loitering or picketing forbidden.—Any person or persons, who, without a just cause or legal excuse therefor, go near to or loiter about the premises or place of business of any other person, firm, corporation, or association of people, engaged in a lawful business, for the purpose, or with the intent of influencing, or inducing other persons not to trade with, buy from, sell to, have business dealings with, or be employed by such persons, firm, corporation, or association, or who picket the works or place of business of such other persons, firms, corporations, or associations of persons, for the purpose of hindering, delaying, or interfering with or injuring any lawful business or enterprise of another, shall be guilty of a misdemeanor; but nothing herein shall prevent any person from soliciting trade or business for a competitive business."

The complaint against petitioner, which is set out in the margin,[2] is phrased substantially in the very words of the statute. The first and second counts charge that petitioner, without just cause or legal excuse, did "go near to or loiter about the premises" of the Brown

[1] Petitioner was first charged and convicted in the Inferior Court of Tuscaloosa County and sentenced to imprisonment for fifty-nine days in default of payment of a fine of one hundred dollars and costs. Upon appeal to the Circuit Court, another complaint was filed and a trial *de novo* was had pursuant to the local practice. The Circuit Court sentenced petitioner, upon his conviction, to imprisonment for seventy-three days in default of payment of a fine of one hundred dollars and costs.

[2] "1. The State of Alabama, by its Solicitor, complains of Byron Thornhill that, within twelve months before the commencement of this prosecution he did without just cause or legal excuse therefor, go near to or loiter about the premises or place of business of another person, firm, corporation or association of people, to-wit: the Brown Wood Preserving Company, Inc., a corporation, engaged in a lawful business, for the purpose or with the intent of influencing

Wood Preserving Company with the intent or purpose of influencing others to adopt one of enumerated courses of conduct. In the third count, the charge is that petitioner "did picket" the works of the Company "for the purpose of hindering, delaying or interfering with or injuring [its] lawful business". Petitioner demurred to the complaint on the grounds, among others, that Section 3448 was repugnant to the Constitution of the United States in that it deprived him of "the right of peaceful assemblage", "the right of freedom of speech", and "the right to petition for redress". The demurrer, so far as the record shows, was not ruled upon, and petitioner pleaded not guilty. The Circuit Court then proceeded to try the case without a jury, one not being asked for or demanded. At the close of the case for the State, petitioner moved to exclude all the testimony taken at the trial on the ground that Section 3448 was violative of the Constitution of the United States.[3] The Circuit Court overruled the motion, found petitioner "guilty of Loitering and Picketing as charged in the complaint", and entered judgment accordingly. The judgment was affirmed by the Court of Appeals, which considered the constitutional question and sustained the section on the authority of two previous decisions in the Alabama courts.[4] *O'Rourke* v. *City of Birmingham*, 27 Ala. App. 133,

or inducing other persons not to trade with, buy from, sell to, have business dealings with, or be employed by the said Brown Wood Preserving Company, Inc., a corporation, for the purpose of hindering, delaying or interfering with or injuring the lawful business or enterprise of the said Brown Wood Preserving Company, Inc., a corporation.

"2. [The second count is identical with the first, except that the last clause, charging a purpose to hinder, delay or interfere, etc., with the lawful business of the Preserving Company, is omitted.]

"3. The State of Alabama, by its Solicitor, complains of Byron Thornhill that, within twelve months before the commencement of this prosecution he did picket the works or place of business of another person, firm, corporation or association of people, to-wit, the Brown Wood Preserving Company, Inc., a corporation, for the purpose of hindering, delaying, or interfering with or injuring the lawful business or enterprise of the said Brown Wood Preserving Company, Inc., a corporation."

[3] The petitioner also moved to exclude the testimony on the ground that it was insufficient to sustain a conviction. Upon being asked by the Court whether he insisted on this ground, however, counsel for petitioner stated that the only question he wanted to raise was the constitutionality of the statute.

[4] The Court of Appeals stated: "It seems clear enough that the evidence adduced upon the trial was sufficient to bring appellant's actions, for which he was being prosecuted, within the purview of the prohibition implied in said Statute.

"So, as conceded by able counsel here representing appellant, 'the only question involved in this appeal is the constitutionality *vel non* of Section 3448 of the Code of Alabama of 1923.'"

168 So. 206, cert. denied, 232 Ala. 355, 168 So. 209; *Hardie-Tynes Mfg. Co.* v. *Cruise*, 189 Ala. 66, 66 So. 657. A petition for certiorari was denied by the Supreme Court of the State. The case is here on certiorari granted because of the importance of the questions presented. December 11, 1939.

The proofs consist of the testimony of two witnesses for the prosecution.[5] It appears that petitioner on the morning of his arrest was seen "in company with six or eight other men" "on the picket line" at the plant of the Brown Wood Preserving Company. Some weeks previously a strike order had been issued by a Union, aparently affiliated with The American Federation of Labor, which had as members all but four of the approximately one hundred employees of the plant. Since that time a picket line with two picket posts of six to eight men each had been maintained around the plant twenty-four hours a day. The picket posts appear to have been on Company property, "on a private entrance for employees, and not on any public road." One witness explained that practically all of the employees live on Company property and get their mail from a post office on Company property and that the Union holds its meetings on Company property. No demand was ever made upon the men not to come on the property. There is no testimony indicating the nature of the dispute between the Union and the Preserving Company, or the course of events which led to the issuance of the strike order, or the nature of the efforts for conciliation.

The Company scheduled a day for the plant to resume operations. One of the witnesses, Clarence Simpson, who was not a member of the Union, on reporting to the plant on the day indicated, was approached by petitioner who told him that "they were on strike and did not want anybody to go up there to work." None of the other employees said anything to Simpson, who te fied: "Neither Mr. Thornhill nor any other employee threatened me on the occasion testified to. Mr. Thornhill aproached me in a peaceful manner, and did not put me in fear; he did not appear to be mad." "I then turned and went back to the house, and did not go to work." The other witness, J. M. Walden, testified: "At the time Mr. Thornhill and Clarence Simpson were talking to each other, there was no one else present, and I heard no harsh words and saw nothing

[5] No evidence was offered on behalf of petitioner.

threatening in the manner of either man.'"[6] For engaging in some or all of these activities, petitioner was arrested, charged, and convicted as described.

First. The freedom of speech and of the press, which are secured by the First Amendment against abridgment by the United States, are among the fundamental personal rights and liberties which are secured to all persons by the Fourteenth Amendment against abridgment by a state.[7]

The safeguarding of these rights to the ends that men may speak as they think on matters vital to them and that falsehoods may be exposed through the processes of education and discussion is essential to free government. Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth. Noxious doctrines in those fields may be refuted and their evil averted by the courageous exercise of the right of free discussion. Abridgment of freedom of speech and of the press, however, impairs those opportunities for public education that are essential to effective exercise of the power of correcting error through the processes of popular government. Compare *United States* v. *Carolene Products*, 304 U. S. 144, 152-153n. Mere legislative preference for one rather than another means for combatting substantive evils, therefore, may well prove an inadequate foundation on which to rest regulations which are aimed at or in their operation diminish the effective exercise of rights so necessary to the maintenance of democratic institutions. It is imperative that, when the effective exercise of these rights is claimed to be abridged, the courts should "weigh the circumstances" and "appraise the substantiality of the reasons advanced" in support of the challenged regulations. *Schneider* v. *State*, 308 U. S. 147, 161, 162.

Second. The section in question must be judged upon its face.

The finding against petitioner was a general one. It did not

[6] Simpson and Walden are not in entire accord with respect to the number of persons present during the conversation between Simpson and petitioner. A possible inference from Simpson's testimony, considered by itself, is that petitioner was in the company of six or eight others when the conversation took place. This difference is not material in our view of the case.

[7] Schneider v. State, 308 U. S. 147, 160; Lovell v. Griffin, 303 U. S. 444, 450; De Jonge v. Oregon, 299 U. S. 353; Grosjean v. American Press Co., 297 U. S. 233, 244; Near v. Minnesota, 283 U. S. 697, 707; Stromberg v. California, 283 U. S. 359, 368; Gitlow v. New York, 268 U. S. 652, 666. See Palko v. Connecticut, 302 U. S. 319, 326-327.

specify the testimony upon which it rested.[8] The charges were framed in the words of the statute and so must be given a like construction. The courts below expressed no intention of narrowing the construction put upon the statute by prior State decisions.[9] In these circumstance, there is no occasion to go behind the face of the statute or of the complaint for the purpose of determining whether the evidence, together with the permissible inferences to be drawn from it, could ever support a conviction founded upon different and more precise charges. "Conviction upon a charge not made would be a sheer denial of due process." *De Jonge* v. *Oregon*, 299 U. S. 353, 362; *Stromberg* v. *California*, 283 U. S. 359, 367-368. The State urges that petitioner may not complain of the deprivation of any rights but his own. It would not follow that on this record petitioner could not complain of the sweeping regulations here challenged.

There is a further reason for testing the section on its face. Proof of an abuse of power in the particular case has never been deemed a requisite for attack on the constitutionality of a statute purporting to license the dissemination of ideas. *Schneider* v. *State*, 308 U. S. 147, 162-165; *Hague* v. *C.I.O.*, 307 U. S. 496, 516; *Lovell* v. *Griffin*, 303 U. S. 444, 451. The cases when interpreted in the light of their facts indicate that the rule is not based upon any assumption that application for the license would be refused or would result in the imposition of other unlawful regulations.[10] Rather it derives from an appreciation of the character of the evil inherent in a licensing system. The power of the licensor against which John Milton directed his assault by his "Appeal for the Liberty of Unlicensed Printing" is pernicious not merely by reason of the censure of particular comments but by reason of the threat to censure comments on matters of public concern. It is not the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion. See *Near* v. *Minnesota*, 283 U. S. 697, 713. One who might have had a

merely

[8] The trial court merely found petitioner "guilty of Loitering and Picketing as charged in the complaint."

[9] The Court of Appeals determined merely that the evidence was sufficient to support the conviction under Section 3448. See note 4, *supra*, p. 2. It then sustained the judgment in reliance upon O'Rourke v. City of Birmingham, 27 Ala. App. 133, 168 So. 206, cert. denied, 232 Ala. 355, 168 So. 209; and Hardie-Tynes Mfg. Co. v. Cruise, 189 Ala. 66, 66 So. 657.

[10] Compare Electric Bond Co. v. Comm'n, 303 U. S. 419; Smith v. Cahoon, 283 U. S. 553, 562; Gundling v. Chicago, 177 U. S. 183, 186; Lehon v. Atlanta, 242 U. S. 53, 55, 56; Hall v. Geiger-Jones Co., 242 U. S. 539, 553, 554.

license ~~merely~~ for the asking may therefore call into question the whole scheme of licensing when he is prosecuted for failure to procure it. *Lovell* v. *Griffin*, 303 U. S. 444; *Hague* v. *C.I.O.*, 307 U. S. 496. A like threat is inherent in a penal statute, like that in question here, which does not aim specifically at evils within the allowable area of State control but, on the contrary, sweeps within its ambit other activities that, in ordinary circumstances constitute an exercise of freedom of speech or of the press. The existence of a such a statute, which readily lends itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure, results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview.[11] It is not any less effective or, if the restraint is not permissible, less pernicious than the restraint on freedom of discussion imposed by the threat of censorship.[12] An accused, after arrest and conviction under such a statute, does not have to sustain the burden of demonstrating that the State could not constitutionally have written a different and specific statute covering his activities as disclosed by the charge and the evidence introduced against him. *Schneider* v. *State*, 308 U. S. 147, 155, 162-163. Where regulations of the liberty of free discussion are concerned, there are special reasons for observing the rule that it is the statute, and not the accusation or the evidence under it, which prescribes the limits of permissible conduct and warns against transgression. *Stromberg* v. *California*, 283 U. S. 359, 368; *Schneider* v. *State*, 308 U. S. 147, 155, 162-163. Compare *Lanzetta* v. *New Jersey*, 306 U. S. 451.

Third. Section 3448 has been applied by the State courts so as to prohibit a single individual from walking slowly and peacefully back and forth on the public sidewalk in front of the premises of an employer, without speaking to anyone, carrying a sign or placard

[11] The record in the case at bar permits the inference that, while picketing had been carried on for several weeks, with six to eight men at each of two picket posts, Section 3448 was not enforced against anyone other than petitioner, the Union President, and then only after his conversation with Simpson who thereupon returned home rather than report for work.

[12] A distinguished commentator has observed that "the liberty of the press might be rendered a mockery and a delusion, and the phrase itself a by-word, if, while every man was at liberty to publish what he pleased, the public authorities might nevertheless punish him for harmless publications." 2 Cooley, Const. Lim., 8th ed., p. 885. See Madison's Report on the Virginia Resolutions, 4 Ell. Deb., 2d ed., 1836, p. 569; Address on the Conduct of the Maryland Convention of 1788, 2 id., p. 552.

on a staff above his head stating only the fact that the employer did not employ union men affiliated with the American Federation of Labor;[13] the purpose of the described activity was concededly to advise customers and prospective customers of the relationship existing between the employer and its employees and thereby to induce such customers not to patronize the employer. *O'Rourke* v. *City of Birmingham*, 27 Ala. App. 133, 168 So. 206, cert. denied, 232 Ala. 355, 168 So. 209.[14] The statute as thus authoritatively construed and applied leaves room for no exceptions based upon either the number of persons engaged in the proscribed activity, the peaceful character of their demeanor, the nature of their dispute with an employer, or the restrained character and the accurateness of the terminology used in notifying the public of the facts of the dispute.

The numerous forms of conduct proscribed by Section 3448 are subsumed under two offenses: the first embraces the activities of all who "without just cause or legal excuse" "go near to or loiter about the premises" of any person engaged in a lawful business for the purpose of influencing or inducing others to adopt any of certain enumerated courses of action; the second, all who "picket" the place of business of any such person "for the purpose of hindering, delaying or interfering with or injuring any lawful business or enterprise of another."[15] It is apparent that one or the other of the offenses comprehends every practicable method whereby the facts of a labor dispute may be publicized in the vicinity of the place of business of an employer. The phrase "without just cause or legal excuse" does not in any effective manner restrict the breadth of the regulation; the words themselves have no ascertainable meaning either inherent or historical. Compare *Lanzetta* v. *New Jersey*, 306 U. S. 451, 453-455.[16] The courses of action, listed

[13] The employer in fact had locked out its union stagehands and was working others not regularly employed as stagehands in admitted violation of the National Industrial Recovery Act.

[14] Accused there asserted that the application of Section 3448 to the particular facts of his case deprived him of rights guaranteed to him by the Fourteenth Amendment. The Court of Appeals passed upon this constitutional question and decided it adversely to the contentions of accused.

[15] There is a proviso that "nothing herein shall prevent any person from soliciting trade or business for a competitive business."

[16] So far as the phrase may have been given meaning by the State courts it apparently grants authority to the court and the jury to consider defensive matter brought forward by the accused, depending for its sufficiency not upon rules of general application but upon the peculiar facts of each case. See Owens v. State, 74 Ala. 401; Bailey v. State, 161 Ala. 75, 49 So. 886; Folmar v. State, 19 Ala. App. 435, 97 So. 768. Compare O'Rourke v. City of Birmingham, 27 Ala. App. 133, 168 So. 206, cert. denied, 232 Ala. 355, 168 So. 209.

under the first offense, which an accused—including an employee—may not urge others to take, comprehends those which in many instances would normally result from merely publicizing, without annoyance or threat of any kind, the facts of a labor dispute. An intention to hinder, delay or interfere with a lawful business, which is an element of the second offense, likewise can be proved merely by showing that others reacted in a way normally expectable of some upon learning the facts of a dispute.[17] The vague contours of the term "picket" are nowhere delineated.[18] Employees or others, accordingly, may be found to be within the purview of the term and convicted for engaging in activities identical with those proscribed by the first offense. In sum, whatever the means used to publicize the facts of a labor dispute, whether by printed sign, by pamphlet, by word of mouth or otherwise, all such activity without exception is within the inclusive prohibition of the statute so long as it occurs in the vicinity of the scene of the dispute.

Fourth. We think that Section 3448 is invalid on its face.

The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and

[17] The only direct evidence in the case at bar to show that the activity of petitioner was accompanied by the necessary intent or purpose is the fact that one other employee, after talking with petitioner, refrained from reporting for work as planned. There is evidence here that the other employee was acquainted with the facts prior to his conversation with petitioner. The State concedes, however, that under Section 3448 everyone must be deemed to intend the natural and probable consequences of his acts. See Jacobs *v.* State, 17 Ala. App. 396, 85 So. 837; Reid *v.* State, 18 Ala. App. 371, 92 So. 513; Weeks *v.* State, 24 Ala. App. 198, 134 So. 870, cert. denied, 222 Ala. 442, 132 So. 871; Worrell *v.* State, 24 Ala. App. 313, 136 So. 737, cert. denied, 223 Ala. 425, 136 So. 738.

[18] See Hellerstein, *Picketing Legislation and the Courts* (1931), 10 No. Car. L. Rev. 158, 186n.: "A picketer may: (1) Merely observe workers or customers. (2) Communicate information, e. g., that a strike is in progress, making either true, untrue or libelous statements. (3) Persuade employees or customers not to engage in relations with the employer: (a) through the use of banners, without speaking, carrying true, untrue or libelous legends; (b) by speaking, (i) in a calm, dispassionate manner, (ii) in a heated, hostile manner, (iii) using abusive epithets and profanity, (iv) yelling loudly, (v) by persisting in making arguments when employees or customers refuse to listen; (c) by offering money or similar inducements to strike breakers. (4) Threaten employees or customers: (a) by the mere presence of the picketer; the presence may be a threat of, (i) physical violence, (ii) social ostracism, being branded in the community as a "scab", (iii) a trade or employees' boycott, i. e., preventing workers from securing employment and refusing to trade with customers, (iv) threatening injury to property; (b) by verbal threats. (5) Assaults and use of violence. (6) Destruction of property. (7) Blocking of entrances and interference with traffic.

"The picketer may engage in a combination of any of the types of conduct enumerated above. The picketing may be carried on singly or in groups; it may be directed to employees alone or to customers alone or to both. It may involve persons who have contracts with the employer or those who have not or both."

truthfully all matters of public concern without previous restraint or fear of subsequent punishment.[19] The exigencies of the colonial period and the efforts to secure freedom from oppressive administration developed a broadened conception of these liberties as adequate to supply the public need for information and education with respect to the significant issues of the times.[20] The Continental Congress in its letter sent to the Inhabitants of Quebec (October 26, 1774) referred to the "five great rights" and said: "The last right we shall mention, regards the freedom of the press. The importance of this consists, besides the advancement of truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated, into more honourable and just modes of conducting affairs." Journal of the Continental Congress, 1904 ed., vol. I, pp. 104, 108. Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.

In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution. *Hague* v. *C.I.O.*, 307 U. S. 496; *Schneider* v. *State*, 308 U. S. 147, 155, 162-63. See *Senn* v. *Tile Layers Union*, 301 U. S. 468, 478. It is recognized now that satisfactory hours and wages and working conditions in industry and a bargaining position which makes these possible have an importance which is not less than the interests of those in the business or industry directly concerned. The health of the present generation and of those as yet unborn may depend on these matters, and the practices in a single factory may have economic repercussions upon a whole region and affect widespread systems of marketing. The merest glance at State and Federal legislation on the subject demonstrates the force of the argu-

[19] Stromberg v. California, 283 U. S. 359; Near v. Minnesota, 283 U. S. 697; Lovell v. Griffin, 303 U. S. 444; Hague v. CIO, 307 U. S. 496; Schneider v. State, 308 U. S. 147.

[20] See Duniway, *The Development of Freedom of the Press in Massachusetts*, p. 123 *et seq.*; Tyler, *Literary History of the American Revolution*, *passim*; 2 Bancroft, *History of the United States*, p. 261; Schofield, *Freedom of the Press in the United States* (1914), 9 Proc. Am. Sociol. Soc. 67, 76, 80.

ment that labor relations are not matters of mere local or private concern. Free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society. The issues raised by regulations, such as are challenged here, infringing upon the right of employees effectively to inform the public of the facts of a labor dispute are part of this larger problem. We concur in the observation of Mr. Justice Brandeis, speaking for the Court in *Senn's* case (301 U. S. at 478): "Members of a union might, without special statutory authorization by a State, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution."

It is true that the rights of employers and employees to conduct their economic affairs and to compete with others for a share in the products of industry are subject to modification or qualification in the interests of the society in which they exist.[21] This is but an instance of the power of the State to set the limits of permissible contest open to industrial combatants. See Mr. Justice Brandeis in 254 U. S. at 488. It does not follow that the State in dealing with the evils arising from industrial disputes may impair the effective exercise of the right to discuss freely industrial relations which are matters of public concern. A contrary conclusion could be used to support abridgment of freedom of speech and of the press concerning almost every matter of importance to society.

The range of activities proscribed by Section 3448, whether characterized as picketing or loitering or otherwise, embraces nearly every practicable, effective means whereby those interested—including the employees directly affected—may enlighten the public on the nature and causes of a labor dispute. The safeguarding of these means is essential to the securing of an informed and educated public opinion with respect to a matter which is of public concern. It may be that effective exercise of the means of advancing public knowledge may persuade some of those reached to refrain from entering into advantageous relations with the business establishment which is the scene of the dispute. Every expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group in society. But the group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of

public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests. Abridgment of the liberty of such discussion can be justified only where the clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion.[22] We hold that the danger of injury to an industrial concern is neither so serious nor so imminent as to justify the sweeping proscription of freedom of discussion embodied in Section 3448.

The State urges that the purpose of the challenged statute is the protection of the community from the violence and breaches of the peace, which, it asserts, are the concomitants of picketing. The power and the duty of the State to take adequate steps to preserve the peace and to protect the privacy, the lives, and the property of its residents cannot be doubted. But no clear and present danger of destruction of life or property, or invasion of the right of privacy, or breach of the peace can be thought to be inherent in the activities of every person who approaches the premises of an employer and publicizes the facts of a labor dispute involving the latter. We are not now concerned with picketing en masse or otherwise conducted which might occasion such imminent and aggravated danger to these interests as to justify a statute narrowly drawn to cover the precise situation giving rise to the danger. Compare *American Foundries* v. *Tri-City Council*, 257 U. S. 184, 205. Section 3448 in question here does not aim specifically at serious encroachments on these interests and does not evidence any such care in balancing these interests against the interest of the community and that of the individual in freedom of discussion on matters of public concern.

It is not enough to say that Section 3448 is limited or restricted in its application to such activity as takes place at the scene of the labor dispute "[The] streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider* v. *State*, 308 U. S. 147, 161; *Hague* v. *C.I.O.*, 307 U. S.

21 See, e. g., Senn v. Tile Layers Union, 301 U. S. 468; Ethyl Gasoline Corp. v. United States, No. 536, this Term; National Labor Relations Board v. Newport News Co., No. 20, this Term; West Coast Hotel Co. v. Parrish, 300 U. S. 379; Nebbia v. New York, 291 U. S. 502; Dorchy v. Kansas, 272 U. S. 306; Eastern States Retail Lumber Dealers Association v. United States, 234 U. S. 600; Aikens v. Wisconsin, 195 U. S. 194; Holden v. Hardy, 169 U. S. 366.

22 See Mr. Justice Holmes in 249 U. S. at 52; 250 U. S. at 630.

496, 515-16.[23] The danger of breach of the peace or serious invasion of rights of property or privacy at the scene of a labor dispute is not sufficiently imminent in all cases to warrant the legislature in determining that such place is not appropriate for the range of activities outlawed by Section 3448.

Reversed.

Mr. Justice McReynolds is of opinion that the judgment below should be affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

[23] The fact that the activities for which petitioner was arrested and convicted took place on the private property of the Preserving Company is without significance. Petitioner and the other employees were never treated as trespassers, assuming that they could be where the Company owns such a substantial part of the town. See p. 3, *supra*. And Section 3448, in any event, must be tested upon its face.